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UNIVERSITY OF MALAYA (UNIVERSITY MALAYA MEDICAL CENTRE) v. FBSM CTECH SDN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
B ZALEHA YUSOF JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-1693-09-2016]
17 APRIL 2018

C ***CONTRACT:*** *Privity – Subcontract – Employer terminated contract with main contractor, leading to termination of contract between main contractor and subcontractor – Subcontractor obtained judgment for payment against main contractor, causing main contractor to wind up – Subcontractor sanctioned as creditor and claimed against employer – Whether subcontractor could represent main contractor to sue and recover monies payable by employer to main contractor* D *– Whether there was privity of contract between employer and subcontractor – Whether there was cause of action – Whether 'privity of contract' same as 'privity of interest'*

COMPANY LAW: *Liquidation – Creditor – Subcontractor obtained judgment for payment against main contractor, causing main contractor to wind up –* E *Subcontractor sanctioned as creditor and claimed against employer – Whether subcontractor could represent main contractor to sue and recover monies payable by employer to main contractor – Ambit of liquidator's powers – Whether liquidator empowered to sanction creditor to sue on behalf of company in liquidation – Companies Act 1965*

F ***CIVIL PROCEDURE:*** *Striking out – Application for – Contract and subcontract – Subcontractor claimed for payment against employer – Whether there was privity of contract between employer and subcontractor – Whether there were triable issues – Whether ought to be struck out – Rules of Court 2012, O. 18 r. 19*

G The appellant ('the first defendant'), appointed Technitium Sdn Bhd ('the second defendant') as the main contractor for a project ('the principal agreement'). The second defendant subsequently appointed the respondent ('the plaintiff') as its subcontractor pursuant to a letter of award ('the LOA'). Under the LOA, any payment due would only be paid to the plaintiff upon the second defendant's receipt of payment from the first defendant. When the H first defendant terminated the principal agreement, the LOA was also terminated. At the High Court, the plaintiff successfully obtained a judgment for payment against the second defendant and this resulted in the latter's winding up. The plaintiff then claimed against the first and second defendants on the ground that the plaintiff had successfully obtained sanction to I represent the second defendant to sue and recover monies payable by the first defendant to the second defendant, then in liquidation. The first defendant applied to strike out the plaintiff's claim pursuant to O. 18 r. 19 of the Rules

of Court 2012 ('the ROC'). The application was dismissed on the grounds that (i) there was sufficient privity of interest between the plaintiff and the first defendant following the execution of the principal agreement; (ii) the nexus and the parties' privity of interest disclosed some causes of action which raised questions fit to be decided at a full hearing. Hence, the present appeal. The first defendant argued that (i) there was no privity of contract between the first defendant and the plaintiff; and (ii) the liquidator of the second defendant could not sanction the plaintiff, as a creditor, to initiate a legal action in its own name for or on behalf of the company in liquidation.

Held (allowing appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) 'Privity of interest' was not pleaded in the statement of claim nor was it raised as a point of submission. The trial judge misapprehended what 'privity of interest' was and assumed that it was somehow related to 'privity of contract'. 'Privity of interest' is used in relation to *res judicata* in order to consider whether the issues raised or the matters dealt with, in one case previously, binds a litigant in another case. That kind of litigant in a case, normally, has a privity of interest with the previous issue of case which may invite the application of *res judicata*. To find that the phrase 'privity of interest' may create some cause of action was not known in law. The term 'privity of interest' could not alter the fact that there was no privity of contract between the two parties. (paras 12 & 13)

(2) There was no contractual nexus between the plaintiff and the first defendant. The relationship between the parties was a classic example of a contractual agreement; the employer appointed the main contractor and the main contractor appointed a subcontractor to undertake a particular project of the employer. The contractual relationship are normally defined separately as between the employer and the main contractor and the main contractor with its subcontractor. Since privity of contract clearly applied only between the first and second defendants, unless the main contractor had assigned, novated or sold its chose in action to the plaintiff, it could not sue in its own name for and on behalf of the second defendant. There was nothing that could confer any authority on the plaintiff to pursue any claim on behalf of the second defendant against the first defendant. (paras 14-16)

(3) The plaintiff had no cause of action against the first defendant. The laws relating to companies' liquidation do not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation. The trial judge failed to appreciate what 'sanction' was and the ambit of a liquidator's powers under the Companies Act 1965. (paras 17 & 19)

(4) The order of the High Court was set aside. The first defendant's application under O. 18 r. 19 of the ROC was allowed. Therefore, the claim by the plaintiff against the first defendant was struck out. (para 20)

A ***Bahasa Malaysia*** *Headnotes*

Perayu ('defendan pertama') melantik Technitium Sdn Bhd ('defendan kedua') sebagai kontraktor utama bagi sebuah projek ('perjanjian utama'). Defendan kedua seterusnya melantik responden ('plaintif') sebagai subkontraktornya bawah surat tawaran ('ST'). Bawah ST ini, apa-apa
B bayaran terhutang hanya akan dibayar kepada plaintif apabila defendan kedua menerima bayaran daripada defendan pertama. Apabila defendan pertama menamatkan perjanjian utama, ST turut ditamatkan. Di Mahkamah Tinggi, plaintif berjaya memperoleh penghakiman bagi bayaran terhadap defendan kedua dan ini menyebabkan defendan kedua digulung. Plaintif
C kemudian menuntut terhadap defendan pertama dan kedua atas alasan plaintif berjaya memperoleh kebenaran mewakili defendan kedua untuk menyaman dan mendapatkan bayaran yang perlu dibayar oleh defendan pertama kepada defendan kedua yang, ketika itu, dalam likuidasi. Defendan pertama memohon membatalkan tuntutan plaintif bawah A. 18 k. 19
D Kaedah-Kaedah Mahkamah 2012 ('KKM'). Permohonan ini ditolak atas alasan (i) terdapat priviti kepentingan antara plaintif dan defendan pertama susulan pelaksanaan perjanjian utama; (ii) hubungan priviti kepentingan pihak-pihak mendedahkan kausa-kausa tindakan yang membangkitkan soalan-soalan yang sesuai untuk diputuskan dalam perbicaraan penuh. Maka
E timbul rayuan ini. Defendan pertama menghujahkan (i) tiada priviti kontrak antaranya dan plaintif; dan (ii) pelikuidasi defendan kedua tidak boleh membenarkan plaintif, sebagai pemiutang, untuk memulakan tindakan undang-undang atas namanya bagi atau untuk pihak syarikat dalam likuidasi.

Diputuskan (membenarkan rayuan)

F **Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:**

(1) 'Priviti kepentingan' tidak diplidkan dalam pernyataan tuntutan mahupun dibangkitkan sebagai hujahan. Hakim bicara tersalah faham maksud 'priviti kepentingan' dan beranggapan ini berkaitan 'priviti kontrak'. 'Priviti kepentingan' digunakan dalam kes berkaitan *res*
G *judicata* untuk mempertimbangkan sama ada isu-isu yang dibangkitkan atau hal perkara yang ditangani, dalam kes terdahulu, mengikat pelitigasi dalam kes lain. Kebiasaannya, pelitigasi sebegini dalam satu-satu kes mempunyai priviti kepentingan dalam isu terdahulu kes yang mungkin mengundang pemakaian *res judicata*. Dapatan bahawa frasa
H 'priviti kepentingan' akan membentuk beberapa kausa tindakan, tidak diiktiraf undang-undang. Terma 'priviti kepentingan' tidak mengubah fakta bahawa tiada priviti kontrak antara kedua-dua pihak.

(2) Tiada hubungan kontrak antara plaintif dan defendan pertama. Hubungan antara pihak-pihak adalah contoh klasik satu perjanjian
I kontrak; majikan melantik kontraktor utama dan kontraktor utama melantik subkontraktor untuk melaksanakan projek majikan. Hubungan kontrak biasanya digariskan secara berasingan antara majikan dan kontraktor utama dan kontraktor utama dan subkontraktornya. Oleh

kerana priviti kontrak jelas terpakai antara defendan pertama dan kedua, kecuali kontraktor utama telah menyerahhakan, mengubah atau menjual hak dalam tindakan kepada plaintif, kontraktor utama tidak boleh menyaman atas namanya bagi dan bagi pihak defendan kedua. Tiada apa-apa yang boleh memberi kuasa kepada plaintif untuk meneruskan apa-apa tuntutan bagi pihak defendan kedua terhadap defendan pertama.

(3) Plaintif tiada kausa tindakan terhadap defendan pertama. Undang-undang berkaitan likuidasi syarikat tidak memberi kuasa kepada pelikuidasi untuk membenarkan mana-mana pemiutang menyaman bagi pihak syarikat dalam likuidasi. Hakim bicara gagal mempertimbangkan maksud 'kebenaran' dan lingkungan kuasa pelikuidasi bawah Akta Syarikat 1965.

(4) Perintah Mahkamah Tinggi diketepikan. Permohonan defendan pertama bawah A. 18 k. 19 KKM dibenarkan. Oleh itu, tuntutan plaintif terhadap defendan pertama dibatalkan.

Case(s) referred to:

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
Housing and Development Board v. Lee Sem Yoong Sdn Bhd [1987] 1 LNS 30 SC ***(refd)***
Nadarajah Konthandapany & Anor v. N Oothaya Suriyan Nadarajah; Vasu Karupiah (Intervener) [2016] 1 LNS 174 HC ***(refd)***
Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah & Ors and Another Appeal [2014] 1 LNS 340 CA ***(refd)***
Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 236(2)(a), (3)
Rules of Court 2012, O. 18 r. 19(1)(b), (d)

For the appellant - Fahri Azzat & Nurul Rafeeza Hamdan; M/s Fahri & Co
For the respondent - Vincent Lim & Emily Wong; M/s Dennis Nik & Wong

[Editor's note: Appeal from High Court, Kuala Lumpur; Summons No: 22NCVC-574-10-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf JCA:

[1] This appeal is lodged by the first defendant UMMC against the decision of the learned High Court Judge at Kuala Lumpur, who had dismissed its application for striking out under O. 18 r. 19 of the Rules of Court 2012. We have heard the appeal and have allowed the appeal of the first defendant for the claim of the plaintiff against the first defendant be struck out.

[2] We note that the contractual relationship between the parties in this suit are these. The first defendant UMMC, appointed the second defendant Technitium Sdn Bhd as the main contractor to supply, deliver, install, test and commission Total Hospital Information System (THIS) at University Malaya Medical Centre (UMMC). This was made pursuant to a written contract dated 8 April 2006 (the principal agreement).

[3] The second defendant subsequently appointed the plaintiff FBSM Ctech Sdn Bhd, as its subcontractor pursuant to a letter of award dated 28 April 2006. Under this letter of award, a back to back payment arrangement was made between the second defendant and the plaintiff where any payment due to the plaintiff under the letter of award would only be paid to the plaintiff, upon the second defendant's receipt of payment from the first defendant UMMC.

[4] The plaintiff subcontractor, thereafter entered into agreements with various other sub-contractors namely; IBA Health (Malaysia) Sdn Bhd, Agfa Healthcare Corporation, Century Software and, TOMMS, to undertake the performance under the letter of award.

[5] The first defendant UMMC, terminated the principal agreement with the second defendant as its main contractor by a letter dated 1 January 2010 which led to the termination of the letter of award by the second defendant with the plaintiff subcontractor on 5 April 2010.

[6] The plaintiff subcontractor meanwhile filed a Civil Suit No. D-22NCC-1017-2010 against the second defendant main contractor, for payment under the letter of award. The plaintiff obtained judgment against the second defendant which resulted in the latter's subsequent winding up *vide* a winding-up order dated 18 June 2012.

[7] The plaintiff commenced this action against both the first defendant UMMC as well as the second defendant, main contractor Technitium (in liquidation). From the pleadings, it appears that the claim made by the plaintiff against the first defendant is purely on the basis that the plaintiff has obtained sanction to represent the second defendant to sue and recover monies payable by the first defendant to the second defendant, then in liquidation.

[8] The first defendant UMMC filed an application in the High Court encl. 6, under O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012, to strike out the plaintiff's claim against it. The learned High Court Judge dismissed the application on the following grounds. According to Her Ladyship, there was sufficient privity of interest between the plaintiff and the first defendant UMMC, following the first defendant's execution of the principal agreement with the second defendant; that the nexus and the parties' privity of interest' disclose some causes of action which raise questions fit to be decided in a full hearing.

[9] On appeal against that decision the first defendant UMMC, raised two main grounds. First there is no privity of contract between the first defendant UMMC with the plaintiff and secondly, the liquidator of the second defendant cannot sanction the plaintiff as a creditor, to initiate a legal action in its own name for or on behalf of the company in liquidation.

[10] We have examined closely the reason propounded by the learned trial judge, at para. 6.4 where it was decided as follows:

> 6.4. Despite Plaintiff not being a party to the Principal Agreement, I find sufficient privity of interest between the Plaintiff and the 1st Defendant in the 2nd Defendant's award of contract to the Plaintiff following the 1st Defendant's execution of Principal Agreement with the 1st Defendant. The nexus and, parties' privy disclose some cause of action and, raise question fit to be decided in a full hearing. The mere fact that the Plaintiff's case is weak and, not likely to succeed at the trial is no ground for the Writ to be struck out summarily.

[11] It is noted from the grounds of judgment that the learned trial judge did acknowledge that there was no privity of contract between the first defendant and the plaintiff. However, despite that finding, the learned judge proceeded to hold that there was 'sufficient privity of interest' between them. Her Ladyship found the second defendant's subcontracting the contract to the plaintiff, following the first defendant's execution of principal agreement with the second defendant had created a relationship between the first defendant UMMC with the plaintiff. In short, the learned judge said because the plaintiff and Technitium (second defendant) signed their subcontract after Technitium signed the principal agreement with the first defendant, there somehow arose 'privity of interest' between them.

[12] The reasoning by the learned trial judge is contradictory to the settled legal position and the concept of privity of contract. The trial judge had misapprehended what 'privity of interest' is and had assumed that it is somehow related to 'privity of contract'. The phrase 'privity of interest' is a term of art used in relation to *res judicata* in order to consider whether the issues raised or the matters dealt in one case previously, binds a litigant in another case. That kind of litigant in a case, normally has a privity of interest with the previous issue of case which may invite the application of *res judicata* (see *Nadarajah Konthandapany & Anor v. N Oothaya Suriyan Nadarajah; Vasu Karupiah (Interveners)* [2016] 1 LNS 174; *Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah & Ors and Another Appeal* [2014] 1 LNS 340; [2014] 4 MLJ 85, CA, *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062, CA)

[13] To find that the phrase 'privity of interest' may create 'some cause of action' is not known in law. This term 'privity of interest' cannot alter the fact that there is no privity of contract between the two parties. It is also not clear what exactly the 'some causes of action' that Her Ladyship had in mind

as it was not articulated in the grounds of judgment. In any case, 'privity of interest' was not pleaded in the statement of claim and neither was it raised as a point of submission. It is trite that parties cannot raise issues which are not pleaded.

[14] What we found clear is that there is no contractual nexus between the plaintiff and the first defendant. The relationship between the parties in this case in fact, is a classic example of a contractual arrangement, where the employer appointed the main contractor, and the main contractor appointed a subcontractor to undertake a particular project of the employer. The contractual relationship is normally defined separately as between the employer and the main contractor, and the main contractor with its subcontractor.

[15] Since privity of contract clearly applies only as between the first defendant with the second defendant as the main contractor, unless the main contractor had assigned, novated, or sold its chose in action to the plaintiff, it cannot sue in its own name for and on behalf of the second defendant.

[16] There is nothing in the statement of claim which pleaded any assignment, novation or the transfer of a chose of action by the second defendant against the first defendant to the plaintiff. Neither is there a pleaded case which is premised on a transfer of beneficial or legal interest in its chose of action by the second defendant to the plaintiff (see *Housing and Development Board v. Lee Sem Yoong Sdn Bhd* [1987] 1 LNS 30, SC). As such, there is nothing that can confer any authority on the plaintiff to pursue any claim on behalf of the second defendant against the first defendant.

[17] The learned High Court Judge had further decided that:

> As to the issue of whether the Plaintiff can be validly given the sanction by the 2nd Defendant's liquidators to commence legal proceedings on its behalf, the asset and liability of a limited company vest in the liquidators upon its liquidation. Accordingly, the sanction is well within the 2nd Defendant's liquidators' jurisdiction. In this respect, however, the Court is also empowered to provide sanction to authorise other person to institute action.'

Her Ladyship found that the liquidator of the second defendant, is authorised to 'sanction' the plaintiff which was a creditor that wound up the second defendant, to sue the first defendant on its behalf in its own name. There is no law that says a liquidator's powers as contained in s. 236 of the Companies Act 1965 can allow a liquidator to 'sanction' a creditor to take out an action for and on behalf of a wound-up company (see s. 236(3) of the Companies Act 1965). In this regard, we found the learned trial judge had failed to appreciate what sanction is, and the ambit of a liquidator's powers under the Companies Act.

[18] The plaintiff sought to rely on the Federal Court decision in *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 to justify that it can sue the first defendant. *Zaitun Marketing (supra)* however, is a case decided on a completely different point. It was held in that case that a liquidator did not have to first obtain authority from the court or the committee of inspection, to exercise the powers to appoint a lawyer to initiate, continue or defend a claim under s. 236(2)(a) of the Companies Act. It was not a decision on whether a private liquidator can give sanction to a creditor to initiate a legal suit in its own name for and on behalf of the wound-up company.

[19] From the appeal records before us, we find it plain and clear that the plaintiff has no cause of action against the first defendant as there is no privity of contract between them. The law relating to companies' liquidation does not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation. For these reasons, we have no hesitation to allow the appeal by the first defendant and make an order that the claim of the plaintiff against the first defendant should stand struck out.

[20] We therefore allow the appeal of the first defendant, and set aside the order by the learned trial judge. Consequently, we allow the application of the first defendant under O. 18 r. 19 of the Rules of Court. Hence, the claim by the plaintiff against the first defendant is struck out.